BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: December 14, 1997

CASE NO: 96-INA-361

In the Matter of:

FLORACOOL, INC.
Employer,

On Behalf of:

MARIO ALFREDO WENDORFF
Alien

Appearance: Alicia M. Navarro, Esq.
Miami, Florida
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Mario Alfredo Wendorff ("Alien") filed by Employer Floracool, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Miami, Florida, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely

affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On August 31, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of International Shipping Supervisor. The duties of the job offered were described as follows:

> "Plans and coordinates loading of cargo for exportation choosing the cargo aircraft routing inbound and outbound air freight shipments to their destinations. Determine rental of air cargo to be used with cargo. Make shipping arrangements with shipping companies locally and with South and Central America, including the port codes, specific requirements of weight and depth for each post and requirements of packing and weight distribution in the aircraft. Must make shipping arrangements based on port regulations and oversees codes for freight forwarding." (AF-61-146)

No specific education was required; 2 years experience in the job offered. Wages were $600.00 per week. Applicant would supervise 4 employees and report to the President. The state agency referred 22 U.S. applicants. (AF-43-60)

On February 27, 1996, the CO issued a NOF denying certification, finding that the job offer was responded to by 22 applicants of which at least three were rejected without benefit of interview even though they were at least as well qualified as alien was at time of hire and/or were rejected for unlawful reasons. Specifically, Jose David Barco, Jairo E. De La Rosa and Israel Novick were cited by the CO and their backgrounds set out. The CO required documentation that the applicants at time of consideration were rejected for lawful job-related reasons and that a good faith effort was conducted. (AF-38-42)

Employer, April 4,1996, through its attorney forwarded a rebuttal stating: ”There was a scribener’s error in the Recruitment Report previously sent..in the section referring to Jairo de la Rosa and Jose David Barco. The recruitment Report indicates that these resumes were reviewed, implying that no interview took place.” Actually, telephone interviews were conducted by Employer’s Assistant Manager. “Mr. de la Rosa could not give a satisfactory explanation as to why his Resume shows that he worked until 1993. It is crucial that our potential employee have and maintain a consistent employment background, and be honest and forthright as to any lapses in employment. This further raises serious concerns about the reasons for not only the lapse in employment, but the reasons for it which he fails to state.” Nevertheless, Employer stated that applicant De La Rosa was contacted in a telephone interview and found not to have the specific experience with the duties to be performed. Mr. Barco was rejected because several telephone attempts were made and messages left, but no reply received. Moreover, Mr. Barco’s experience was with hands on work and not in planning and coordination of the work. Mr. Novick was rejected because he had been a consultant for the last ten years. “If Mr. Novick does have the actual knowledge and experience required, we will be more than willing to receive a revised resume, that would reflect that experience, and would warrant an interview.” (AF-34-37)

A Final Determination was issued April 18, 1996, finding that the three applicants were rejected for nonlawful reasons and that a good faith recruitment effort had not been conducted. Documentary evidence was not supplied to indicate Mr. La Rosa’s background was inadequate. Moreover, Mr. De La Rosa stated in a follow up questionnaire that he was never contacted. Mr. Barco and Mr. Novick were rejected without benefit of an interview in spite of the fact that their resumes indicated a strong possibility that they met the minimum requirements of the job. “In the case of Mr. Barco, the employer indicates that they tried to contact him by telephone but were unsuccessful. In order to prove good faith the employer should have tried an alternative means to contact Mr. De la Rosa.” The CO also disagreed with Employer that Mr. Novick was not qualified for the job and stated he should at least have been interviewed. (AF-32-33)

Employer, May 21, 1996 requested review of the Final Denial. (AF-1-31)

Discussion

The regulations provide in 656.21(b)(6) that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly

open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 87-INA-161 (Dec. 7, 1988)(en banc).

As a practical matter, we note that 22 applications were initially received for this opportunity which did not require significant education and only two years experience. Employer's mere assertions that the three rejected applicants were not qualified is not sufficient documentation.

With respect to applicant De La Rosa, where an employer's statements concerning contact of an applicant during recruitment are contradictory to and unsupported by the applicant's statements, the CO may properly give greater weight to applicant's statements that they were not contacted. Robert B. Fry, Jr. 89-INA-6 (Dec.28, 1989); Hardman's Auto Electric Service, 96-INA-148 (Sept. 26, 1997). With respect to applicant Barco, it is well settled that reasonable efforts to contact qualified U.S. applicants may require more than one type of contact. Diana Mock, 88-INA-225 (April 9, 1990). An employer who does nothing more than make unanswered phone calls or leave messages on an answering machine has not made a reasonable effort to contact a U.S. worker where the address is available. K-J Machine Co., 93-INA-71(April 12, 1994); Blessed Sacrament School, 96-INA-00052 (October 29, 1997). Finally, with respect to Mr. Novick as well as the other applicants, Employer has a duty to interview. Where an applicant's resume shows a broad range of experience, education, and training that raises the reasonable possibility that the applicant is qualified, although the resume does not expressly state that he meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Ceylon Shipping, Inc., 92-INA- 322 (Aug. 30, 1993); Garden Lace Cutting, 96-INA-00240 (October 29, 1997).

Accordingly, we find the Employer has failed to establish a good faith effort to recruit qualified U.S. workers for the job opportunity. Thus the CO's denial of labor certification must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.